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No. 08-505

Supreme Court, U.S.
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In the

Supreme Court of the United States

CCA ASSOCIATES,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Emergency Low Income Housing Preservation Act of 1987 and the Low-Income Housing Preservation and Resident Homeownership Act of 1990 effected a taking of Petitioner's property, without just compensation, in violation of the Fifth Amendment of the Constitution, under either the *Loretto per se* physical takings test or the *Penn Central* regulatory takings test?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioner CCA Associates.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has extensive litigation experience in the area of property rights, having participated in several takings cases before this Court, including *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

PLF and its supporters have an interest in the constitutional issues raised in this case. PLF seeks to underscore the need for this Court to address how properly to evaluate temporary physical takings of the kind alleged in this case.

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[1] All parties have consented to the filing of this brief. Counsel of record for all parties received notice of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case concerns whether the federal government can conscript private citizens and their properties for the twenty-year housing of low-income tenants without incurring liability for a taking. The government induced Petitioner to build and operate affordable housing. Under the contract, Petitioner obtained federally insured forty-year mortgages in return for the agreement to lease its property at below-market rents for the mortgage term.

As an incentive, Petitioner could prepay the mortgage and regain complete control of its property after twenty years. But as the twenty-year mark approached, the government enacted the Emergency Low Income Housing and Preservation Act of 1987 (ELIHPA), imposing a two-year moratorium on prepayments beginning in 1988. Then, the government enacted the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA), indefinitely cancelling prepayment rights.

Petitioner sued the government, alleging LIHPRHA effected a compensable taking under the Takings Clause of the United States Constitution. Shortly thereafter, LIHPRHA was repealed. After nearly fifteen years of litigation, the Federal Circuit rejected Petitioner's claims in light of its previous decision in *Cienega Gardens v. United States*, App. at 95a[2] (*Cienega X*), fully incorporating that previous decision into its decision in the present case.

The petition raises important constitutional issues relating to the Takings Clause of the United States

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[2] Amicus cites to the Petition for Certiorari Appendix (App.) when possible.

Constitution. Review is necessary to resolve important questions concerning the application of two takings tests—the *per se* takings test under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and the *ad hoc* takings test under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The decisions below deepen the confusion over these tests and, in some respects, gut the protections they afford against government abuse. The Court's current takings jurisprudence provides no definitive answers to resolve this confusion.

ARGUMENT

I

REVIEW IS NECESSARY TO RESOLVE IMPORTANT QUESTIONS REGARDING THE SCOPE OF *PER SE* TAKINGS DOCTRINE

Petitioner alleges the government effected a *per se* taking of its property under *Loretto*, 458 U.S. 419, because LIHPRHA forced Petitioner to suffer a physical occupation of its property by third parties for twenty years. The Federal Circuit rejected the *per se* takings claim in light of its previous decision in *Cienega X*, App. at 95a;[3] the Federal Circuit has already decided that LIHPRHA "merely . . . enhance[d]

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[3] The Federal Circuit summarily rejected Petitioner's claims, stating it was "obligated to follow [its] earlier decision in *Cienega X*," a previous decision which addressed arguments for all relevant purposes "identical" to those in the present case. App. at 2a. Its decision totally incorporated by reference the *Cienega Gardens* line of cases, so Amicus PLF must refer to the previous decisions, particularly *Cienega X*, in addressing issues presently before this Court.

an existing tenant's possessory interest." *Cienega Gardens v. United States*, 265 F.3d 1237, 1248 (Fed. Cir. 2001) (*Cienega VI*).

While not entirely clear, its rejection of the petitioner's *per se* takings claim appears to have been based on two faulty premises. First, government-mandated physical occupations of short or limited duration—like LIHPRHA's twenty-year forced occupation of Petitioner's property—are not "permanent" enough to qualify as *per se* takings under *Loretto*. Second, once a landowner chooses a specific use for his property, a *per se* taking will never result from a government-mandated occupation or possession of the property consistent with that use. *See, e.g.*, *Cienega Gardens v. United States*, 33 Fed. Cl. 196, 214-17 (1995).

This Court's takings jurisprudence lacks an unequivocal response to these misguided premises. Review is necessary to clarify when and how the *per se* takings doctrine applies to temporary physical occupations of private property.

A. Under What Circumstances Will a Temporary Physical Occupation Effect a *Per Se* Taking?

Petitioner's *per se* taking claim is based on this Court's decision in *Loretto*, which the lower courts apparently decided does not apply to finite or temporary physical occupations. In *Loretto*, a New York statute required landlords to permit cable companies to install facilities on their properties—not indefinitely, but only "[s]o long as the property remain[ed] residential and a [cable] company wishe[d] to retain the installation." *Loretto*, 458 U.S. at 439.

The statute was challenged as effecting a *per se* taking, and this Court agreed. *Id.* at 421.

The Court observed that takings challenges to government interference with property rights originally are subject to the *Penn Central* balancing test, which requires a weighing of: (1) the character of the government action, (2) the economic impact on the property owner, and (3) the extent to which the action interferes with distinct investment-backed expectations. *Loretto*, 458 U.S. at 426 (citing *Penn Central*, 438 U.S. at 124). The Court cited "a physical invasion short of an occupation" and "a regulation that merely restricts" property use as examples of takings subject to the *Penn Central* test. *Loretto*, 458 U.S. at 430.

Then, the Court announced a new categorical or *per se* takings test. "[W]hen the physical intrusion reaches the extreme form of a permanent physical occupation," the *Penn Central* test can be dispensed with. *Id.* at 426. With a "permanent physical occupation," the character of the government's action is *the* determinative factor that renders it a categorical or *per se* taking—"without regard" to the resulting public benefit. *Id.* As the Court explained, a "permanent physical occupation" destroys the owner's essential "rights 'to possess, use and dispose of [the property].'" *Id.* at 435 (citation omitted). By requiring landlords to submit to the installation of cable facilities, depriving them of their rights to possess, use, and dispose of the occupied areas, the government effected a *per se* taking.

The Court partly based its holding on a wartime seizure case, which recognized that even short-term physical occupations by government could be

"permanent" enough to be a *per se* taking. *Id.* at 431. In *United States v. Pewee Coal Co., Inc.*, 341 U.S. 114 (1951), the federal government "possessed and operated" the property of a coal mining company for 5-1/2 months in order to stave off a nationwide miners' strike in the middle of the war. *Id.* at 115. The Court *unanimously* concluded that the government's seizure was a *per se* taking, with no regard to the occupation's relatively limited duration. *Id.* (plurality); *id.* at 119 (Reed, J., concurring); *id.* at 121-22 (Burton, J., dissenting). References to the "temporary" nature of the government's possession were made in the context only of the amount of compensation due to the plaintiff. *See, e.g., id.* at 117 (plurality). The *Loretto* Court was unmoved by the fact that the *Pewee Coal* occupation was short-lived, focusing on the character—not the duration—of the government's action. *Loretto*, 458 U.S. at 431 (Because of the " 'actual taking of possession and control,' the taking was as clear as if the Government held full title and ownership." (citing *Pewee Coal*, 341 U.S. at 116 (plurality))).

Other War Department seizure cases affirm *Pewee Coal*'s principle: short-term physical occupations are categorical takings. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949) (*per se* taking in government's temporary use and occupancy of laundromat); *United States v. Petty Motor Co.*, 327 U.S. 372, 378 (1946) (*per se* taking in the government's temporary occupation of a building through the ouster of existing tenants); *United States v. General Motor Corp.*, 323 U.S. 373, 375 (1945) (*per se* taking in the government's "temporary occupancy of a portion of a leased building" for one year). This Court repeatedly reaffirmed the continued vitality of these seizure cases. *Lingle*, 544 U.S. at 537; *First English Evangelical*

Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987).

While expressly relying on *Pewee Coal*, dictum in *Loretto* distinguished a "permanent physical occupation" (which is a *per se* taking) from a "temporary invasion" (which is not). *Loretto*, 458 U.S. at 428. In an enigmatic footnote, the Court said:

> The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical *invasion* is a taking. . . . [S]uch temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.

Id. at 436 n.12.

"This single judicial pronouncement is a principal source of the current uncertainty in the temporary physical takings jurisprudence." Dennis H. Long, Note, *The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and An Opportunity for New Directions in Takings Law*, 72 Ind. L. J. 1185, 1194 (1997). If, as the *Loretto* dictum suggests, *Penn Central*'s test applies to all "temporary" government incursions, then *Loretto* must be interpreted to have overruled *sub silentio* the wartime seizure cases, including *Pewee Coal*. This is improbable: *Loretto* unqualifiedly, expressly relies on *Pewee Coal*. *Loretto*, 458 U.S. at 431. Moreover, this Court has repeatedly reaffirmed *Pewee Coal* and the wartime seizure cases. *Lingle*, 544 U.S. at 537; *First*

English, 482 U.S. at 318. More likely, the *Loretto* Court merely suggested that *Penn Central* applies to "a class of temporary takings claims in which the duration is less than some as yet unspecified threshold"—presumably less than the five-and-a-half months spanning the *Pewee Coal* occupation. Long, *supra*, at 1194. Petitioner's claim against a twenty-year compelled physical occupation of its property is not in this class.

Courts struggle to apply *Loretto* due to its dictum, with conflicting results. In *Preseault v. United States* (*Preseault II*), 27 Fed. Cl. 69 (1992), *rev'd*, 100 F.3d 1525 (Fed. Cir. 1996) (*Preseault III*), plaintiffs owned land through which a railroad had for years owned an easement for its tracks. After the rail company abandoned the easement, plaintiffs expected the easement to revert back to them under state law. But under a federal law enacted to promote recreational use of abandoned railroad routes, the government authorized transfer of the easement as a hiking trail to a neighboring town for a maximum of thirty years. Plaintiffs challenged the government's action as a *per se* taking. *Preseault II*, 27 Fed. Cl. at 75-81.

The Court of Federal Claims found that the government's forced transfer of the easement to a third party effected a "physical occupation," but only a temporary occupation, because of the thirty-year lease limit. *Id.* at 95. Consistent with *Loretto*'s dictum, the court analyzed the physical occupation under the *Penn Central* balancing test and held there was not a taking. The Federal Circuit reversed the decision, finding (without explanation) a *per se* taking. *Preseault III*, 100 F.3d at 1552.

In contrast stands *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991). To combat ground water pollution, the federal government requested access to plaintiffs' property to install wells for monitoring and extracting waste migrating from a nearby site. Notwithstanding plaintiffs' refusal, the federal government installed the wells anyway. *Id.* at 1369. Plaintiffs challenged the government's actions as effecting a taking. The Court of Federal Claims ruled in the government's favor, and the Federal Circuit reversed. *Id.* at 1367.

Consistent with the wartime seizure cases, the Federal Circuit held that the installation of wells on plaintiffs' property constituted a permanent physical occupation, and thus a *per se* taking—regardless of the finite or even short-term duration of the occupation. *Id.* at 1378. Addressing the government's claim that the occupation was temporary, the Federal Circuit offered a different interpretation of "temporary" occupations than the Court of Federal Claims in *Preseault II*:

> "[P]ermanent" does not mean forever . . . . A taking can be for a limited term—what is "taken" is . . . an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute. . . .
>
> . . . .
>
> If the term "temporary" has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and

> thus properly can be viewed as no more than a common law trespass . . . .

Id. at 1376-77.

Loretto left several important questions unresolved. Does a physical occupation of a short-term or finite duration actually bar a *per se* takings claim, as the *Loretto* dictum seems to suggest? If so, how long may the government remain on private property, without consent, before its action becomes "permanent" enough to constitute a *per se* taking? Alternatively, is the dispositive factor in a *per se* taking, as the *Loretto* holding indicates, the "character of the government action"—i.e., whether "the government exercises 'complete dominion or control' over the property interest affected"? M. Reed Hopper, *A Rationale for Partial Regulatory Takings: A Closer Look at Selected United States Supreme Court Precedent*, 31 Sw. U. L. Rev. 19, 21 (2001). Review would establish *how* such intrusive government actions should be scrutinized under the Takings Clause and whether, regardless of duration, they effect a *per se* taking.

B. Does a Landowner's Decision To Make a Specific Use of His Property Bar All *Per Se* Takings Claims Against Subsequent Government-Mandated Occupations Consistent with That Use?

The Court of Federal Claims did not address whether Petitioner's claims ought to be evaluated under *Loretto*'s *per se* takings analysis; it discussed and applied only the *Penn Central* test. App. at 44a (the present action is a "regulatory takings case" to which the *Penn Central* test applies). The court seemed to

believe itself bound by previous decisions in the *Cienega Gardens* cases decreeing the *Penn Central* test applies to what were virtually identical claims. *See, e.g., Cienega VI*, 265 F.3d at 1248-49 (ELIHPA and LIHPRHA were not a *per se* taking because "'the effect of the prepayment restrictions . . . is merely to enhance an existing tenant's possessory interest,' and . . . they do not authorize a 'permanent physical occupation' of the Owners' property." (relying on *Yee v. City of Escondido,* 503 U.S. 519 (1992))).

The Court of Federal Claims previously interpreted *Loretto* and subsequent decisions of this Court as barring Petitioner's *per se* taking claim against LIHPRHA. *Id.* (*Cienega VI* court opinion citing previous *Cienega Gardens* decisions for proposition that *Loretto* does not apply to takings claims under ELIHPA and LIHPRHA). The *Cienega* court's reasoning, adopted by the Federal Circuit, was astonishing. Relying on *Yee v. City of Escondido*, 503 U.S. at 527-28, the court concluded that because investors, like Petitioner, voluntarily agreed to enter the landlord business almost forty years ago, they somehow consented to the forced housing of low-income tenants twenty years later. *Cienega Gardens v. United States*, 33 Fed. Cl. at 214-17. The *Cienega* court's reasoning, totally incorporated in the present case, App. at 2a, finds no basis in this Court's precedents—not even in *Yee*.

Yee involved a takings challenge to a mobile home rent control ordinance. Mobile home park owners claimed the ordinance, along with a state statute, effected a *per se* taking under *Loretto* by eliminating their rights to choose incoming tenants, and set the

rent charged for the pad on which the mobile home sits. *Yee*, 503 U.S. at 526-27.

This Court upheld the ordinance, concluding it did not effect a physical taking, the "element of required acquiescence is at the heart of the concept of occupation," and that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Id.* at 527 (citation and quotation marks omitted). The ordinance did no such thing:

> [N]either the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, [state law] provides that a park owner who wishes to change the use of his land may evict his tenants . . . . Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government.

Id. at 527-28. *Yee* made clear that "[t]his element of *required acquiescence* is at the heart of the concept of occupation." *Id.* at 527 (emphasis added).

Absent government compulsion, there could be no occupation under *Loretto*, and no *per se* taking. The *Yee* Court made clear it did not address a case where "the statute, on its face or as applied, [compelled] a landowner over objection to rent his property or to refrain in perpetuity." *Id.* at 528. LIHPRHA did just that, compelling the objecting petitioner to rent its property to low-income tenants for up to twenty years. Moreover, Petitioner had no reasonable means of converting its property to other uses, so its properties

were at the mercy of the government and its approved tenants. *Yee* does not control this case; *Loretto* does.

The Federal Circuit disagreed. Incorporating its decision in *Cienega Gardens*, it found that LIHPRHA was like the rent control ordinance in *Yee*, App. at 2a, and that neither law compelled Petitioner to do anything, because it essentially chose this fate. The court explained that Petitioner "entered the landlord business voluntarily, more than 20 years ago, . . . [making] LIHPRHA . . . more analogous to the rent control ordinances upheld in such cases as *Yee*." *Cienega Gardens*, 33 Fed. Cl. at 217. Thus, there was no categorical taking.

The Court of Federal Claims erred when interpreting *Yee*. Under *Yee*, if a landowner can change the property use to which a regulation applies, the regulation will not effect a *per se* taking. *Yee* does not support the court's novel theory that Petitioner's voluntary choice to make a specific use of its property bars a *per se* taking claim for subsequent physical occupations that happen to be consistent with that use. If put into practice, this theory would immunize most government-mandated physical occupations of private property against *per se* takings claims. As long as the mandated occupation or possession was consistent with the specific use of the property, the government could always point to the landowner's prior voluntary decision to engage in that use.

Moreover, the Court of Federal Claims conflated the *Loretto* and *Penn Central* tests. In analyzing a *per se* takings claim, the court imported a *Penn Central* factor: the property owner's expectations *prior* to the government wrong. *Penn Central*, 438 U.S. at 124. Yet this Court has on numerous occasions made clear

that the *only* factor *Loretto* and *Penn Central* share is the "character of the government action." *Loretto*, 458 U.S. at 434-35; *see also Lingle*, 544 U.S. at 538 (affirming the distinction between the *Loretto* and *Penn Central* tests). When the character of the government action is a permanent physical occupation of the property, it is a *per se* taking—regardless of the property owner's expectations at the time of the occupation. *Id.*

The Court of Federal Claims' approach to the *per se* takings analysis highlights a circuit split that this Court should resolve. Contrary to the court in this case, other courts interpret *Yee* as conditioning the finding of a *per se* taking on nothing more than the government's "required acquiescence" of the property owner at the time of the physical occupation (the character of the government action). *See, e.g., Gulf Power Co. v. United States*, 187 F.3d 1324, 1329 (11th Cir. 1999); *see also Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 95 (2d Cir. 1992). Review is necessary to resolve the question of whether a landowner's choice to make a specific use of his property bars all *per se* taking claims against subsequent physical occupations consistent with that use.

II

REVIEW IS NECESSARY TO ESTABLISH UNIFORMITY AMONG THE CIRCUITS ON THE PROPER INTERPRETATION AND APPLICATION OF *PENN CENTRAL*

Although Petitioner's takings claims should have been resolved in its favor under *Loretto*'s *per se* rule, the Federal Circuit, incorporating by reference its 2003 decision, at least found that Petitioner had suffered a

taking under the multi-factor balancing test of *Penn Central*. *See Cienega Gardens v. United States (Cienega VIII)*, 331 F.3d 1319, 1353 (Fed. Cir. 2003).

Under *Penn Central*, liability for just compensation under the Takings Clause depends on the offending regulation's economic impact on the property owner and the character of the government action. *Penn Central*, 438 U.S. at 124. Here, the character of the action is clear and the *Cienega VIII* reasoning applies equally: ELIHPA and LIHPRHA "[can] fairly be characterized as akin to . . . [a] physical invasion" of Petitioner's property. *Cienega VIII*, 331 F.2d at 1338. Congress's abrogation of the prepayment option effectively authorized a continuing physical occupation of Petitioner's property against its will; moreover, Congress specifically did so to force a small number of property owners to bear the full costs of providing a general public benefit (affordable housing). *Id.* The record establishes sufficient financial loss to tip the balance of that inquiry in favor of the property owner, and that "ELIHPA and LIHPRHA [frustrated Petitioner's] reasonable investment-backed expectations that [it] would be entitled to prepay." *Id.* at 1353.

The Court of Federal Claims applied this same analysis in *CCA Associates*. The court found that the character of the government's actions in adopting ELIHPA and LIHPRHA "effected a temporary taking of CCA's property." App. at 76a. Regarding the economic impact of rescinding the prepayment option, the court heard evidence on the effect on Petitioner's return on equity and consequent reduction in the value of its property, finding Petitioner had suffered detrimental economic impacts of an 81.25% diminution

in value, a "serious financial loss" supporting a finding of a temporary taking. App. at 75a-76a. Moreover, the court found that Petitioner had invested in the property with the expectation that it could prepay its mortgage after twenty years without HUD approval, and that the government's action had breached these reasonable, investment-backed expectations. App. at 76a.

The Federal Circuit overruled this careful and detailed application of *Penn Central*'s regulatory takings calculus, remanding for consideration of irrelevant factors gleaned by the appellate panel from precedents that did not involve *Penn Central* claims, and without reference to contrary authority from this Court. App. at 2a (incorporating by reference *Cienega X*). The Federal Circuit's interpretation of *Penn Central* guts that landmark decision of any further significance in takings law, and eliminates temporary regulatory takings as a viable cause of action. Review should be granted to establish uniformity among the circuit courts of appeal in their interpretation of this Court's takings jurisprudence.

A. *Cienega X*'s Holding That the Repeal of LIHPRHA's Prepayment Ban May Offset the Government's Liability for a Taking Repudiates *First English* and Eviscerates *Penn Central* as a Deterrent to Predatory Regulation

Petitioner's *Penn Central* claim alleges a temporary, partial taking. This Court recognizes that the government retains the option to rescind an unconstitutional regulation at any time, converting it from a permanent to a temporary taking. *First English*, 482 U.S. at 321. This observation was

reiterated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992):

> Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation.

Id. at 1030 n.17. But this Court has never suggested that rescinding a regulation eliminates the government's liability for compensation during the time the unlawful measure was in effect.

Nevertheless, in *CCA Associates* the Federal Circuit remanded partly on the grounds that "existing takings law requires consideration of the duration of the legislation as part of the takings analysis"—i.e., to determine whether liability for a taking has been incurred, rather than to determine the amount of compensation due. App. at 132a, 2a. In holding that there might be no liability under *Penn Central* because property owners may "only" have been subjected to a nineteen to twenty-seven month taking, *id.*, the Federal Circuit would obviate the very concept of temporary taking. Having found the *Penn Central* factors were met for the time ELIHPA and LIHPRHA were in existence, the Court of Federal Claims' opinion in *Cienega Gardens v. United States (Cienega IX)*, 67 Fed. Cl. 434 (2005), clearly establishes liability for just compensation over this period. Reversal of the Federal Circuit on this point is imperative to preserve any role for *Penn Central* as a deterrent to predatory regulations. If takings liability can be evaded by the simple expedient of repealing offending measures after litigation commences, such unconstitutional enactments may multiply without limit.

B. Measuring the Economic Impact of Land-Use Regulations Against the Lifetime Value of Real Property Would Render *Penn Central*—and the Very Concept of Temporary Takings—a Mere Curiosity

In a straightforward application of *Penn Central*, the Court of Federal Claims determined that Petitioner had suffered a severe economic impact from the application of ELIHPA and LIHPRHA to its property. App. at 76a. The Federal Circuit set aside this determination under *Cienega X*, holding that the economic impact prong of *Penn Central* must be evaluated by the regulation's reduction in the value of real property over its entire expected life, i.e., to infinity. App. at 122a, 2a. This remarkable error, if allowed to stand, would erase this Court's jurisprudence of temporary regulatory takings, render *Penn Central* a curiosity, and reduce the class of compensable takings to those that fit within the narrow categorical rules of *Lucas* or *Loretto*.

The Federal Circuit based this part of its ruling on *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), which did not involve a *Penn Central* claim. Those plaintiffs alleged a deprivation of all economically viable use of their land, resulting in a categorical taking under *Lucas*. *Id.* at 320. Within that limited context, the *Tahoe-Sierra* Court held the landowners must show a loss of the full value of their property in perpetuity. *Id.* at 334-35.

In a gross misreading of *Tahoe-Sierra*, *Cienega X* extends this holding to partial takings, stating "the necessity of considering of the overall [e.g., lifetime]

value of the property was explicitly confirmed in the temporary regulatory takings context." *Cienega X*, App. at 119a (citing *Tahoe-Sierra*, 535 U.S. at 331). If liability for a *Penn Central* taking required a significant economic impact on the value of real property measured over its entire useful life, a reduction in the financial rate of return over the effective duration of a regulation could never effect a taking. Yet this Court has frequently noted that an inadequate return is part of a taking analysis in the context of regulated utilities and other commercial enterprises. *See, e.g., Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). *Penn Central* itself absolved the local government of takings liability in part because of its evaluation that the plaintiffs' railroad terminal could "be regarded as capable of earning a reasonable return" on the owners' investment. *Penn Central*, 438 U.S. at 129, 136.

The decision below requires review by this Court to explicate the relationship between *Penn Central* and *Tahoe-Sierra*, and to clarify that the economic impact prong of the former decision is unaffected by the analysis of *Lucas* claims set forth in the latter.

C. Offsetting Incidental Governmental "Benefits" Against Liability for a Taking Directly Conflicts with the *Suitum* Concurrence and Ignores the Indeterminancy Surrounding This Aspect of *Penn Central*

The most astounding line in *Cienega X* is the majority's assertion that "[t]he Supreme Court in *Penn Central* ***clearly held*** that offsetting benefits must be accounted for as part of the takings analysis itself." *Cienega X*, App. at 123a (emphasis added; citation

omitted). This precise issue was extensively—albeit inconclusively—argued before this Court ten years after *Penn Central*, in *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, a case not mentioned in the Federal Circuit's opinion.

Although *Suitum* was decided on ripeness grounds, the parties briefed and argued the question of whether the availability of transferable development rights (TDRs) should mitigate the defendant agency's liability for a taking, or offset the amount of just compensation due. *See Suitum v. Tahoe Reg'l Planning Agency*, No. 96-243, 1997 WL 87090 (U.S. Feb. 26, 1997) (oral argument); Petitioner's Reply Brief, No. 96-243, 1997 WL 47628, at *17 (U.S. Feb. 5, 1997) ("Even a value-based takings inquiry, moreover, must be directed to the regulation's effect on the inherent utility of the land itself, *not* to the purported value of unrelated assets . . . . TRPA's claim that any resale value of its credits should offset the agency's liability for a taking rests entirely on a mistaken reading of *Penn Central*."). As a result, three *Suitum* Court Justices filed a concurring opinion squarely contrary to *Cienega X*'s interpretation of *Penn Central*:

> Considering in the takings calculus the *market* value of TDRs is contrary to the import of a whole series of cases, before and since, which make clear that the relevant issue is the extent to which use or development of the land has been restricted. Indeed, it is contrary to the whole principle that land-use regulation, if severe enough, can constitute a taking which must be *fully* compensated.

Suitum, 520 U.S. at 749 (Scalia, J., concurring in part and concurring in the judgment). Because *Suitum* was decided on ripeness grounds, the question of the proper treatment of governmental "benefits" bestowed coincidentally with a taking was reserved for another day:

> While the pleadings raise issues about the significance of the TDR's both to the claim that a taking has occurred and to the constitutional requirement of just compensation, we have no occasion to decide, and we do not decide, whether or not these TDR's may be considered in deciding the issue whether there has been a taking in this case, as opposed to the issue whether just compensation has been afforded for such a taking.

Suitum, 520 U.S. at 728. This Court ought to resolve this vital question. As the Court of Federal Claims noted in *Cienega IX*, the Federal Circuit's position on this point would "enable the government to take property with impunity, so long as it offered a modicum of recompense by statutory action." *Cienega IX*, 67 Fed. Cl. at 470. This is precisely the outcome foreseen by the *Suitum* concurrence, and one that only a decisive ruling by this Court can forestall.

III

THE DECISION BELOW HAS SEVERE IMPLICATIONS BEYOND THIS CASE

A. If Allowed To Stand, the Decision Below Will Have a Chilling Effect on Affordable Housing Availability

The decision below discourages investors from entering the affordable housing market because of the risk of barriers to freely exiting the market.

This nation needs more affordable housing. Twenty-two percent of its thirty-four million renters pay half or more of their income for rent. Walter Leginski, U.S. Dep't of Health & Human Serv., *2007 National Symposium on Homelessness Research: Historical and Contextual Influences on the U.S. Response to Contemporary Homelessness* 1-26 (2007).[4] In 2003, affordable housing units were available to only twenty-two percent of extremely low-income renters. *Id.* Only an increase in the supply of affordable housing can alleviate this severe shortage.

There are many impediments negatively affecting the entry of investors into the affordable housing market. State and local land use restrictions, such as restrictive zoning and unrealistically stringent environmental regulations, drive up the cost of housing, as do exorbitant exactions imposed on developers. The decision below only adds to these existing barriers to the creation of affordable housing.

Taking good-faith investors' investment-backed expectations and property without just compensation

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[4] *Available at* http://aspe.hhs.gov/hsp/homelessness/symposium07/leginski/report.pdf (last visited Nov. 12, 2008).

will deter future private investment in affordable housing. The trial court recognized the pre-payment option as a major incentive for new affordable housing creation. App. at 56a. Investors accepted the offer, building and increasing the supply of affordable housing—serving the government's goal of ensuring its citizens have homes.

The risk that the government may unilaterally change the rules, forcing investors to remain as affordable housing providers indefinitely, will have a chilling effect on future investment in this sector. Review is necessary to ensure that private investors are not driven away from the affordable housing market altogether.

B. Denial of Review Will Signal State and Local Governments That They May Severely Restrict Traditional Private Property Rights on the Basis of "Voluntary" Consent

Denial of review will affect the rights of private property owners across the country. State and local governments may see denial as a signal that they too may take private property rights without compensation. More particularly, these entities may see denial as authorization for the continued physical invasion of mobile home park owners' private property without needing to pay just compensation.

Mobile home parks are a source of affordable housing. In California, a recent trend in local governments is to implement mobile home park "condominium conversion" ordinances. *See, e.g.*, Santa Cruz County Code §§ 13.30.010-13.30.060 (implementing mobile home park conversion

ordinance); Santa Rosa City Code §§ 19-76.010-19-76.030 (same); Sonoma County Code §§ 25-39.7 (same). These ordinances prevent mobile home park owners from initiating the conversion of their parks into resident-owned communities without permission from their current renters. Other states are considering similar ordinances. *See, e.g.*, Pierce County Council Resolution No. R2008-118 (2008) (Washington State Pierce County Ordinance).[5]

Such ordinances, ostensibly preserving rent-control restrictions, prevent mobile home park owners from freely subdividing and selling their property to their tenants, and from excluding others from their property, without just compensation—just as the federal government appropriated those same rights from CCA Associates through the enactment of LIHPRHA. To sell his own land, the owner must first obtain the permission of a majority or super-majority of his tenants. The mobile home park owner's current tenants become *de facto* agents of the state, "requir[ing] the landowner to submit" to their occupation of his property as long as they want—potentially forever. *Yee*, 503 U.S. at 527. Moreover, neither the tenants, *de facto* agents of their governments, nor the governments permitting this unwanted, continued physical invasion are currently willing to comply with the constitutional mandate of just compensation for this appropriation of a mobile home park owner's property rights.

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[5] *Available at* http://srch.mrsc.org:8080/sampledocs/template.htm?view=mainresults&username=ords&password=ords&s_action=newSearch&s_type=all&s_terms=Mobile+home+park+conversion (last visited Nov. 12, 2008).

Denial of review may signal local and state governments that they can justify the removal of certain sticks from the bundle of private property rights—the right to alienate and the right to exclude others—without compensation. These governments will follow the lower courts' logic: once a landowner chooses a specific use for his property—here, a mobile home park—a *per se* taking will never result from a government-mandated occupation or possession of the property that is consistent with that use. *Cf. Cienega Gardens v. United States*, 33 Fed. Cl. at 214-17. They will use denial of certiorari as support for this perversion of private property rights.

Review is necessary so this Court may affirm that when a physical invasion of land is countenanced by the government, this taking must be compensated, whether the *Loretto per se* physical takings test or *Penn Central ad hoc* takings test applies.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

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Respectfully submitted,

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